extras or as compensation for rescission. In my view it would have been imprudent for the plaintiff to have entered into a binding contract to build until the land was vacated and available for building. The defendant cannot rightly complain that the damages are not ascertained where ascertainment of them would have been likely to increase them. As the plaintiff had had his plans passed, obtained licences and so forth, incurring substantial preliminary expense, it is impossible to doubt his sincerity. Nor do I doubt that if he made a contract to-morrow the cost would substantially exceed the cost six months ago. The fact that the precise amount has not been ascertained is not an insuperable obstacle because the difference can be estimated on professional advice.

But the fact remains that this particular damage has not been actually sustained and may never be sustained. It is possible, though not probable, that some political event might so affect markets during the next few weeks that the plaintiff would be able to build his houses at, or near, the former price. Also, he is not committed to build; he might sell the land at a profit to someone else. There is, in fact, no security that in the long run the plaintiff will suffer any damage under this head though at the moment it looks as though he would. If this were the only factor I should be disposed to postpone assessment of damages until the actual cost of the buildings had been ascertained.

The question of remoteness, however, is a separate issue from the questions of uncertainty and futurity. Can it be said that the increase in cost is a natural result of the delay? Prices sometimes fall. It might easily happen that by postponing building for six months a much lower price would be tendered. If that had in fact occurred the plaintiff would have suffered no damage whatever under this heading. He would have benefitted by the unforeseen result of a delay which was, *prima facie,* unfavourable to him.

In short, the rise in prices of materials was not in any sense caused by the delay. It was an independent event; the fact that it occurred when it did was a fortuitous coincidence. I think, therefore, that the loss attributable to this rise in building costs was an indirect or consequential loss, for which the trespasser is not legally liable — unfortunate though it is for the owner.

This, however, does not dispose of the claim. It is clear that if the defendant had not caused the delay the plaintiff could, and would, have completed his houses and could have let them; he has therefore lost rents for a period equal to the delay and this loss is directly due to the delay. I do not think that the question whether the defendant could foresee this loss is material but this defendant in fact knew that the land was wanted for immediate building, so it is a loss which he can be taken to have foreseen, and for which I think he is liable. Taking the rents for six months at the architect's lower figure, $350 a house, I assess the amount at $8,400.

I think the plaintiff is also entitled to general damages for the trespass and I award $2,000 under this heading.

Strictly, the defendant ought also to pay arrears of rent at the rate applicable to the land as vacant land but the amount is very small in comparison and may be ignored.

As it will necessarily take some time to remove the heavy materials in question and the Chinese New Year intervenes I allow the defendant an extra month to vacate.

There will therefore be judgment for the plaintiff for $10,400 and costs and an order that the defendant vacate the land on or before 31st March next.

Judgment for the plaintiff.

MANSELL JONES & ANOR. v. PUBLIC PROSECUTOR

[App. Crim. Juris. (Taylor, J.) February 18, 1952]
[K.L. — Criminal Summons Appeal No. 72 of 1951]

Public Servants — Offences by — Principles of sentence — Dismissal.

In assessing the sentence for an offence by a public servant the Court ought not to take into consideration the probability of dismissal.

CRIMINAL SUMMONS APPEAL.

D. G. Rawson for the 1st appellant.

R. P. S. Rajasooria for the 2nd appellant.

P. G. Clough (D.P.P.) for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — The first appellant is an Assistant Superintendent of Police, who was stationed at Mentakab in charge of the Special Branch. The second appellant is a Detective Sergeant of some 17 years' service. They were charged in the Sessions Court with causing hurt to one Madhavan for the purpose of eliciting a confession or information relating to collecting money for bandits.

The facts shortly are that the appellants arrested the complainant at the instance of the Perak police. They had no information at all as to the offence for which he was wanted. The arrest was effected, quite rightly, at night. Instead of taking him direct to the police station they took him a mile or two beyond the town to a quarry bordering jungle. They took him

out of the car and led him some distance along a track for interrogation, during which it is agreed that other police fired at least two pistol shots close to the prisoner. No effective information was obtained. The complainant alleges that the officer slapped his face and that the Sergeant prodded him in the stomach with the muzzle of a pistol. It is not suggested that any serious hurt was caused. The President found that the accused were not seeking any specific confession or statement and therefore the intent charged was not proved but he was satisfied that the complainant was slapped and prodded and he accordingly convicted the appellants of simple assault under section 352 of the Penal Code.

[The learned Judge dealt with the merits of the appeal and held that there was no ground to interfere with the learned President's decision on the facts, and continued:]

The question of sentence is difficult. The first appellant was sentenced to one month's rigorous imprisonment and also to a fine of $150. The second appellant was sentenced to one day's rigorous imprisonment. In fixing these periods the President took into consideration the difficult Emergency situation in Pahang and "the facts that the defendants would lose their employments and pensions." He expressed great sympathy for both the accused on account of the difficulties of their work, especially in obtaining information about bandit activities and the strain on their nerves. As regards the second appellant the President rightly gave much weight to the fact that he was acting under the orders and in the immediate presence of his superior officer.

The question of dismissal raises a point of principle of some general importance. In the last resort, sentence is a matter for the Executive. They not infrequently commute; they can, and occasionally do, pardon. Dismissal likewise is for the Executive and in my view it ought never to rest with the Court alone because there sometimes are circumstances material to the question of dismissal which cannot be brought before the Court. It appears to be generally thought that, except in trivial cases, dismissal automatically follows conviction but I most emphatically do not accept this submission. I agree that four times out of five dismissal does follow but in my experience the question of dismissal has always been separately considered by the Executive in each individual case on its merits. If the Courts try to assess sentences on the basis that dismissal will necessarily follow they are embarrassed because their information is incomplete. If, believing dismissal to be automatic, the Court passes a merely nominal sentence, as in the case of the second appellant, the Executive may be embarrassed. If they take no action, the man goes altogether unpunished. If they dismiss, it may be excessive. Also, they may reinstate even after dismissal. This may be rare but I distinctly remember a case where this was done on the view that by suffering imprisonment the man had expiated his offence.

Since the war, there have been cases where a Court convicting a public servant of a small offence has been asked to make a recommendation aimed against dismissal. In my view such applications should be discouraged and never acted on at the instance of the accused. It is always open to the Executive to write to the Court for any information, or even for a recommendation, should they desire it. They seldom do so, probably because they usually have all the information about the proceedings ready to hand through the Deputy Public Prosecutor. But I have never known them to hesitate to ask for further information or to experience the slightest difficulty in obtaining it.

I do not of course mean that the question whether an accused person is a public servant is to be disregarded. Between private persons the violence used in this case would have called for nothing more than a small fine. The fact that the accused is a public servant and committed the offence in excess or breach of duty must be considered by the Court but I am clearly of opinion that the sentence ought to reflect the opinion of the Court on the offence proved in the circumstances proved and ought not to take into account the dismissal which, as I have said, may probably but will not necessarily follow.

The second appellant did not plead that he was acting under the orders of the first appellant. He denied taking part in any assault. It was found on sufficient evidence that he did take part in the assault and it is clear that he did so, if not on explicit orders at least with the open approval of his superior officer. The position of an experienced sergeant is distinguishable from that of a junior constable. He must be taken to have known that the whole proceeding was improper and it was his duty to say: — "Sir, this is a thing we cannot do." The only way to make the law known is to enforce it. In my opinion a proper sentence on the second appellant was, in relation to the sentence imposed on the first appelant, seven days' rigorous imprisonment without the option. If at the trial a proportionate fine had been added I should certainly not have disturbed it but I did not think it necessary, on appeal, to add a fine. I accordingly enhanced the sentence on the second appellant to seven days. The sentence imposed on the first appellant appeared to me to be in all the circumstances reasonable in extent and not unsuitable in its nature and I therefore affirmed it.

Order accordingly.